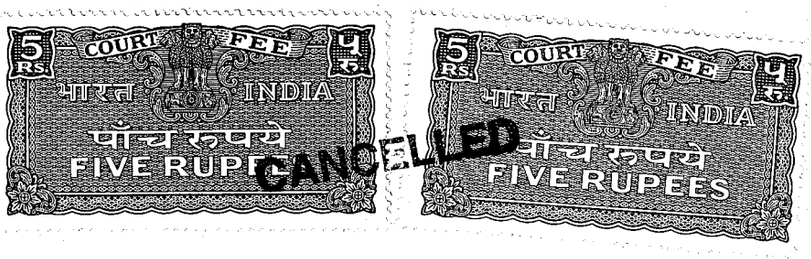

(3)

(1)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

MISC.APPEAL NO. 1085 OF 2004

P.R. No. 2357-04
Presented by Shri Mahesh Kanadey
dated 23/12/04

APPELLANT: **DEFENDANT no.1**	Dayashankar Gupta, S/o Chhatradhari Sav, aged about 30 years, R/o Kedarpur, Nagar-Ambikapur, Distt. Surguja (C.G.)
	V E R S U S
RESPONDENTS **PLAINTIFF**	1. State Bank of India, Branch Ambikapur, Distt. Surguja, C.G.
Defendant no.2	2. Dinesh Kumar Gupta S/o Loknath Sav.,
Defendant no.3	3. Sunil Kumar Gupta, S/o Loknath Sav The respondent no. 2 & 3 R/o Village –Ghui, P.S. Ramkola, Tah. Pratapur, Distt. Surguja, C.G.
Defendant no.4.	4. Kripashankar Gupta S/o Chhatradhari Sav, aged about 28 years, R/o Village Kedarpur, Distt. Surguja C.G.

MEMO OF APPEAL UNDER ORDER XLIII RULE 1(d) OF CODE OF CIVIL PROCEDURE 1908.

Being aggrieved by the order passed on 12.08.04 by the IV Additional District Judge (F.T.C), Ambikapur, (C.G.) in Misc.C.S. No. 06/2004, the parties being " Dayashankar Gupta Vs. State Bank of

A.F.R.

HIGH COURT OF CHHATTISGARH, BILASPUR

M.A.No.1085 of 2004

Dayashankar Gupta

Vs.

State Bank of India and others

O R D E R

Noted
10.5.05

Note
10/5/05
Advocate
Counsel for Appellant.

Post for 10.05.2005

Sd/-
Sunil Kumar Sinha
Judge

A.F.R.

HIGH COURT OF CHHATTISGARH, BILASPUR

M.A.No.1085 of 2004

Dayashankar Gupta

-Vs-

State Bank of India and others

Shri Rakesh Pandey, counsel for the appellant.

Shri N.K. Agrawal, Sr. Advocate with Shri Qamrul Aziz for the respondent No.1.

None for respondents no.2, 3 and 4.

O R D E R

(10.05.2005)

Sunil Kumar Sinha, J

Being aggrieved with the order dated 12.8.2004, passed in Miscellaneous Judicial Case No.6 of 2004 by the 4th Additional District Judge (F.T.C), Ambikapur, the appellant/ defendant no.1 has filed this Misc. Appeal under order 43 Rule 1(d) of C.P.C., as the application under order 9 Rule 13 C.P.C. filed by this appellant for setting aside the ex-parte decree has been dismissed by the said Court.

(2) The brief facts are that the plaintiff-bank filed a suit for recovery of Rs.1,17,961-00 on 17.1.1994. The appellant is defendant no.1 in the said civil suit and the respondents no.2, 3 and 4 are other defendants respectively. The said suit was registered as Civil Suit No.3-B/1994. Originally one Smt. Phulmat was the defendant no.1. However, after her death, her

name was deleted and the remaining defendants were renumbered as above.

(3) After receiving the notices of the court, all the defendants (1 to 5) caused their appearance through their counsel on 14.9.1994 and thereafter, written statements were filed on 11.3.1995. After framing of issues the matter was fixed for bi-party evidence on various dates but was adjourned for so many times because of the absence of witnesses of the plaintiff and ultimately, on 19.8.1998, when the matter was refixed for evidence, the defendants remained absent and the counsel appearing on behalf of the defendants "pleaded no instructions". The court on the said date proceeded exparte against the defendants, recorded exparte evidence of witnesses of the plaintiff-bank, heard the arguments and fixed the matter for judgment on 31.8.1998. The ex-parte judgment and decree was passed on 31.8.1998.

(4) The case of the appellant/defendant is that earlier he was having no knowledge of the aforesaid judgment and decree passed by the trial Court. However, when the execution proceedings were drawn, then he came to know about the said ex-parte decree on 03.10.2001. Thereafter, he came to the District Court on 06.10.2001, an application for obtaining certified copy of the exparte judgment and decree was filed on 08.10.2001, the copy was received on 15.12.2001 and then

only, an application under Order 9 Rule 13 of C.P.C. was filed on 19.12.2001.

(5) Along-with the said application under order 9 rule 13 of C.P.C., the appellant also filed an application for condonation of delay in filing the said application u/s 5 of the Limitation Act. The main ground taken in both the applications is that the counsel appearing for the defendants had assured them that they are not required to come to the Court on each date of hearing and as and when they are required, they shall be duly intimated by him. It is for this reason, the defendants were not appearing before the trial Court and were regularly represented through their counsel. However, counsel for the defendants pleaded no instructions and even thereafter he did not inform them and ultimately the ex-parte judgment & decree was passed against them.

(6) These applications were opposed by the plaintiff. The learned trial Court after hearing the arguments of the parties, dismissed both the applications by passing the order dated 12.8.2004. It is against this order the appellant has filed this appeal before this Court.

(7) Learned counsel for the appellant submits that the court below committed an error of law by rejecting the applications without considering the fact that the appellant had shown sufficient cause for his non-appearance on the said date of

hearing and had also shown sufficient cause for not making the application within the prescribed period of limitation. In fact, the court below failed to consider that the counsel engaged by the defendants did not inform them either about the date of hearing or about pleading "no instructions" on 19.8.1998 at any point of time and the court below without issuing any notice to the defendants, who were not present when their counsel pleaded no instructions, proceeded ex-parte against them and the same was a "sufficient reason" for condoning the delay and setting aside the ex-parte decree.

(8) On the other hand, learned counsel for respondent no.1 opposes this argument. It is submitted that the defendants were negligent in defending the suit and it was not the duty of the Court to issue any notice to the appellant/defendant before proceeding ex-parte against them when their counsel pleaded no instructions on the said date. It is also argued that no sufficient cause was established either for condoning the delay or for allowing the application for setting aside the ex-parte decree.

(9) It is a settled legal position that in a case where an ex-parte decree has been passed, the defendant can apply for setting aside the said decree and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms

as to costs, payment into court or otherwise as it things fit. The application for setting aside should be filed within 30 days as provided under Article 123 of the Limitation Act. If the application is delayed, the defendants so applying may avail the remedy of section 5 of the Limitation Act and seek its condonation by satisfying the Court about the reasons which prevented him from approaching the Court within the prescribed period of limitation under the law.

(10) It has been held by the Apex Court in the matter of ***Ramlal and others, Appellants -Vs- Rewa Coalfields Ltd., reported in AIR 1962 S.C. 361*** that in construing section 5, it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.

This has been held by the apex Court after quoting an observation made by the Madras High Court in the matter of ***Krishna –Vs- Chathappan, ILR 13 Madras 269*** which reads as under:

> *"Section 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafide is imputable to the appellant."*

(11) The apex Court again held in the matter of ***The State of West Bengal –Vs- The Administrator, Howrah Municipality and others reported in (1972) 1 SCC 366*** that the words "sufficient cause" in section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party. (Please see Para 30 of the said judgment).

(12) It has been further held in the matter o ***G.Ramegowda, Major and others –Vs- Special Land Acquisition Officer, Bangalore (1988) 2 SCC 142 vide para 14***that there is no general principle saving the party from all mistakes of its counsel. Each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the

interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay.

(13) It has also been held in the matter of ***N. Balakrishnan – Vs- M.Krishnamurthy (1998) 7 SCC 123*** that "the law of limitation is founded on public policy. It is enshrined in the maxim "***interest reipublicae up sit finis litium***" (it is for the general welfare that a period be put to litigation). The rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time." The Apex Court also held that "the length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory."

(14) In the instant case, if we examine the matter of delay, it comes on record though the application of the appellant that in fact, after filing of the written statement by the defendants, the counsel for the defendants assured them that they are not required to come to the court on each date of hearing and as and when they are required, they shall be duly intimated by him. The relevant order-sheets of the case shows that this

matter was fixed for evidence on so many dates and was adjourned only on account of non-production of plaintiff's witnesses. It is for the first time, the witnesses of the plaintiff appeared on 19.8.1998 and the trial Court took the matter for recording the evidence and on this date only, after appearing for a long period, the counsel "pleaded no instructions" on behalf of the defendants. That is to say that he did not participate in the proceedings of the day and he did not thought it proper to cross examine the plaintiff's witness on behalf of the defendants. It is also an important feature of the case that on the said date, the defendants (including the appellant) were not present and the counsel pleaded no instructions in their absence. Now the question arises as to how a conscious defendant could come to know about the date of evidence so fixed by the Court and also about the pleading of no instructions by his counsel, when he is sitting at home in all bona fide believe that he will be called by his counsel at the appropriate stage of the suit. If the counsel has not informed the date of hearing to a party after assuring that the party would be informed of the same and the party anxiously waits but ultimately the counsel pleads no instruction and even after this he does not inform the party, then naturally a party will come to know about the developments of the case when at a subsequent stage some proceedings (like execution etc.,) are drawn in the matter. The case in hand is a simple case of this nature. The counsel after giving assurance did not participate in the case and had not intimated about the exparte

proceedings drawn by the Court. This explanation given by the appellant supported by an affidavit was to be accepted by the trial court and in fact, in my opinion, the trial Court committed an error of law by dismissing an application filed u/s 5 of the Limitation Act as non-apprisal by the counsel to the party about the date of hearing after due assurance and giving no information about pleading no instructions resulting into delay in approaching the court for want of knowledge is a sufficient cause for condoning such delay especially in the circumstance when the gross negligence or deliberate inaction or lack of bona-fide is not appearing on the part of the appellant. The provisions of section 5 of Limitation Act are to be construed liberally so as to advance substantial justice to a bona-fide and conscious litigant.

(15) Now coming to the question of the main application filed under order 9 rule 13 of CPC, it is argued by the learned counsel for the appellant that the appellant was neither careless nor negligent in defending the suit. After making appearance for a long period, counsel pleaded no instructions and even after that he did not inform them about his pleading no instructions. The defendants were absent on the date of hearing and after pleading no instructions by counsel for the defendants even the trial Court did not issue any notice to the defendants. Learned counsel for the appellant submits that if the trial court has not issued any notice to the defendants who were not present when their counsel pleaded no instructions,

and proceeded exparte against him, it was a sufficient reason for setting aside exparte decree and giving a chance to the defendant for defending his case.

(16) Learned counsel relies upon a decision of the apex court rendered in the matter of ***Malkiat Singh and another –Vs- Joginder Singh and others (1998) 2 SCC 206***. It has been held by the Apex Court vide para 7 that the applicants were neither careless nor negligent in defending the suit and they had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, the apex Court has referred to a decision rendered in the matter of ***Tahil Ram Issardas Sadarangani –Vs- Ramchand Issardas Sadarangani reported in 1993 Supp (3) SCC 256*** wherein the Apex Court opined as under:

> *"It is not disputed in the present case that on 15.3.1974 when Mr.Adhia, Advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr.Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date of hearing should have been sent to the parties. In any case in the facts and circumstances of this case,*

we feel that the party in person was not at fault and as such should not be made to suffer."

(17) On the other hand, learned counsel for the respondent argues that no material is placed by the appellant showing that the defendants were diligently prosecuting the suit and he has not given a proper explanation for his non-appearance on the said date. He referred to the decision of the apex Court rendered in the matter of ***Vijaykumar Durgaprasad Gajbi and others –vs- Kamlabai and others (1995) 6 SCC 148***.

(18) If we examine the records of this case, it would be clear that in the application filed under order 9 rule 13 of CPC, the appellant has pleaded about all these facts and has clearly stated that he is having full interest in the matter. He was diligent in defending the suit. He has specifically pleaded that no information was received by him through his counsel about the hearing of the case. This application and application for condonation of delay have been duly supported by an affidavit of the appellant. However, the respondent Bank has filed a simple reply to both the applications and their reply is not supported by any affidavit of the concerned authority. Hence the material placed before the trial court is not rebutted by respondent no.1 and the explanations in regard to the absence on the said date of hearing has to be accepted. There appears no fault on the part of the appellant when the counsel duly engaged by the appellant did not inform him about the date of hearing and in his absence and also in absence of the other

defendants, pleaded no instructions in the court. Not only this, even after pleading of such no instruction by the counsel in absence of the party, the trial court did not issue any notice to the appellant or any of the defendants and after recording exparte evidence on 19.8.1998 itself heard the arguments on the same day and posted the case for delivery of judgment on 31.8.1998. In fact, in the opinion of this court, these are the sufficient grounds which may indicate that the appellant/defendant was prevented by a sufficient cause from appearing when the suit was called on for hearing and the ex-parte decree granted in favour of respondent no.1 deserves to be set aside.

(19) It is also important to mention this fact here that the suit was filed by the bank for recovery of the outstanding amount of loan which was disbursed to the defendants for purchasing a Tractor for agricultural purpose. The Bank is a financial institution. Even otherwise also it will not be put to the loss in case the exparte decree is set aside and ultimately, after a bi-party contest it succeeds in the matter because in that circumstance they may get interest in accordance with law. That is to say that the interest of the plaintiff is not hampered if an opportunity is given to this appellant/defendant to contest the suit.

(20) In the facts and circumstances of the case, the appeal is allowed. The impugned order passed by the court below is

hereby set aside. The application filed for condonation of delay u/s 5 of the Limitation Act and the application under order 9 rule 13 of CPC are allowed. The exparte judgment & decree passed against the appellant are set aside. The trial court is directed to complete the trial in accordance with law from the stage of plaintiff's evidence. This order is subject to the payment of cost of Rs.1500/- by the appellant to the plaintiff which shall be deposited/paid within a period of 8 weeks from today before the trial Court. This order is subject to the cost and if the costs are not paid within the time specified, this appeal shall be deemed to have been dismissed and the ex parte decree passed against the appellant revived. The appeal is allowed on the terms referred to above. Records of the trial court (Civil Suit and M.J.C) be sent back forthwith.

Sd/-
Sunil Kumar Sinha
Judge

/Rao/